STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2004-135

August 19, 2004

VERIZON MAINE
Petition for Consolidated Arbitration

ORDER DENYING MOTION FOR RECONSIDERATION

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

I. SUMMARY

In this Order, we deny the Motion of Verizon for Clarification and/or Reconsideration of our June 11th Order in this matter. Specifically, we affirm our earlier findings that Verizon may not condition its performance of routine network modifications on amendment of a CLEC's interconnection agreement and that we will assume that existing TELRIC rates include the costs for routine network modifications until Verizon submits a request and support for additional rates.

II. BACKGROUND

On February 20, 2004, Verizon Maine (Verizon) filed a Petition for Consolidated Arbitration (Petition) with the Commission. The Petition requested that the Commission arbitrate disputes between Verizon and competitive local exchange carriers (CLECs) and Commercial Mobile Radio Service (CMRS) carriers relating to Verizon's October 2, 2003, proposed amendment to all interconnection agreements to implement the Federal Communications Commission's (FCC) *Triennial Review Order (TRO)*. After the D.C. Circuit Court of Appeals released its decision in the *United States Telecom Ass'n v. FCC* case (*USTA II),*[1] which upheld, vacated, and remanded various portions of the *TRO*, several CLEC parties filed Motions to Dismiss Verizon's request for arbitration. On June 11, 2004 we issued an Order which included the following findings:

> We find, on balance, that the *TRO* did not establish new law but instead clarified existing obligations. Section 251(c)(3) has always required that Verizon provide access to its UNEs on a non-discriminatory basis. The FCC's new rules merely clarify what is required under that existing obligation. Thus, Verizon must perform routine network modifications on behalf of CLECs in conformance with the FCC's rules. Verizon may not condition its performance of routine network modifications on amendment of a CLEC's interconnection agreement.

[1] *U.S. Telecomm. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)(*USTA II).*

> With regard to the pricing issues associated with the routine modifications, we do not reach a specific decision today. Instead, we find that our existing TELRIC rates should be used until we approve any additional rates in the Wholesale Tariff case or future TELRIC proceeding. Our decision is consistent with the direction given by the FCC in the *TRO.* Specifically, in paragraph 640, the FCC noted that ILEC costs for routine modifications are often already recovered in non-recurring and recurring costs associated with the UNE. In addition, the FCC noted that state commissions have the discretion to determine how any costs that are not already recovered should be recovered. Thus, to the extent that Verizon believes its existing rates do not recover the costs associated with routine modifications, it may amend its cost filings in the Wholesale Tariff case and propose additional rates. If it chooses to do so, it must provide support for the new rates and, in particular, show in detail how the new costs are not already recovered in existing rates.

Order at p.8.

III. MOTION FOR CLARIFICATION AND/OR RECONDIDERATION

A. Verizon's Motion

On July 1, 2004, Verizon filed a Motion for Clarification and/or Reconsideration. In its Motion, Verizon contends that the Commission should clarify its Order by stating clearly that CLECs wanting Verizon to perform routine network modifications must agree to pay Verizon for the modifications and must memorialize the agreement in their interconnection agreement. Verizon argues that, absent an express agreement, CLECs will refuse to pay for the modifications and later claim that the absence of contract language covering the modifications means Verizon has no valid claim for payment. Verizon believes that the TelAct requires all terms and conditions to be included in interconnection agreements and that in the *TRO*, the FCC specifically said that all rules promulgated in the *TRO* should be implemented pursuant to change of law provisions. Thus, according to Verizon, any interconnection agreement that does not provide for automatic implementation of the new FCC rules must be re-negotiated before Verizon can be required to perform routine network modifications.

Verizon further argues that if the Commission disagrees with Verizon on the need for a contract, Verizon's Motion should be considered a Motion for Reconsideration based on the grounds that the Commission lacks authority to overrule the FCC and TelAct. Verizon reiterates its belief that all obligations imposed on Verizon in the TelAct must be memorialized in interconnection agreements. It also argues that the Commission may not lawfully preempt the statutory negotiation process.

B. CLEC Response

AT&T opposes Verizon's Motion and contends that the Commission's Order was clear; Verizon's Motion twists the language of the Order to negate the intent of the Commission that CLECs not have to sign interconnection agreements in order to have Verizon perform routine network modifications. AT&T argued that existing agreements already cover the routine network modification requirements and point to the fact that until summer 2000, Verizon performed many routine network modifications without requiring any change to interconnection agreements. Finally, AT&T states that Verizon's UNE rates are intended to cover the costs of performing any routine network modifications necessary to provision UNEs. Specifically, the FCC noted in paragraph 640 of the *TRO* that "ILEC costs for routine modifications are often already recovered in non-recurring and recurring costs associated with each UNE." The Commission's invitation to Verizon to re-visit UNE rates if it believed it was unfairly compensated provides Verizon with all necessary process.

Conversent argues that there had been no change in law and, therefore, there is nothing to trigger any change in law provisions of interconnection agreements. Conversent also points to Verizon's past practices of performing RNMs without requiring any specific provisions in interconnection agreements. Conversent contends that Verizon's position violates the TelAct, which states that a network element includes the "features, functions, and capabilities that are provided by means of such facilities or equipment." According to Conversent, Verizon must submit proposed rates in the wholesale tariff proceeding and wait for Commission approval; then, and only then, should it modify interconnection agreements. Finally, Conversent questions the validity of Verizon's Motion, claiming that Verizon fails to raise any new issue of fact or law and thus its Motion for Reconsideration should be denied.

Both the Competitive Carrier Coalition (CTC Communications Corp., ICG Telecom Group, Inc., and Lightship Telecom, LLC.) and the CLEC Coalition (Mid-Maine Communications, Oxford Networks, and Pine Tree Networks) concur with Conversent's position. The CLEC Coalition also argues that the FCC was clear that if there are costs that are not covered in existing rates, the state commission must determine how they will be recovered and that Verizon has the burden to provide supporting cost studies.

XO (XO Maine, Inc., and XO Communications, Inc.) contends that Verizon's Motion did nothing more than reargue its case; it did not present any new facts or law to justify its request. XO argues that the *TRO* gave state commissions authority on cost recovery for routine network modifications and that the Commission has found that existing rates allow for cost recovery absent a showing by Verizon otherwise.

III. ANALYSIS

A. Standard

Rule 1004 of Chapter 110 requires a party seeking reconsideration of a Commission order to set forth the specific grounds for reconsideration and the relief requested. Generally, a party seeking reconsideration should not merely reiterate arguments that have already been addressed by the Commission but instead raise issues concerning material error or matters that appear to have been overlooked or not addressed by the Commission. Here, Verizon has sought both clarification and reconsideration. While Verizon's Petition does reiterate arguments which have already been heard and addressed by the Commission, we will address them further in this Order because we see a need to further clarify our earlier decision.

B. Decision

We deny Verizon's Motion for Clarification/Reconsideration because we presume, until presented with evidence to the contrary, that existing interconnection agreements provide Verizon sufficient opportunities to recover any costs associated with performing routine network modifications. We place significant weight on the fact that the FCC made a finding that the costs for routine network modifications are often already included in existing TELRIC rates for UNEs. *TRO* at ¶ 640. We concur with the FCC's finding and hold that until Verizon shows that the costs for certain routine network modifications were not included in existing TELRIC rates, we will presume that the costs were included in the rates we set in Docket No. 97-505. We also find that some of the existing non-recurring TELRIC rates, including those for labor, may provide Verizon a reasonable opportunity to recover costs for many routine network modifications.

If Verizon believes that the costs associated with a particular modification requested by a CLEC are not included in rates and that there is not a suitable proxy found in the non-recurring rates or other approved TELRIC rates, *and* Verizon and the CLEC cannot reach an agreement regarding an appropriate charge, Verizon may use the Commission's Rapid Response Process to bring that matter to the Commission's attention. In its complaint,[2] Verizon should include copies of the appropriate pages from its TELRIC cost study and supporting testimony which show that the modifications were not included in the assumptions used in the study.[3] The Rapid Response Team will make a preliminary assessment and decision. If either party disagrees, it may appeal the matter to the full Commission and we will address it as rapidly as possible. If we

[2] A CLEC may also bring a complaint if it believes that Verizon is not moving expeditiously enough to resolve the issue.

[3] Because of its familiarity with the details of its own cost study, we find that Verizon is in the best position, in the first instance, to determine whether the costs of routine network modifications are built into the assumptions of its TELRIC studies.

determine that a cost study is needed to set a rate for a new routine network modification, we may join the issue to the Consolidated Arbitration/Wholesale Tariff proceeding (Consolidated Proceeding -- Docket Nos. 2004-135/2002-682). If that occurs, we may set an interim rate with true-up provisions so that the UNE can be provisioned to the CLEC.

As for Verizon's concerns regarding interconnection agreement language, because of the decisions we reach above, we find no need to modify existing interconnection agreements. First, existing agreements require CLECs to pay the TELRIC rates associated with all of the UNEs the CLEC orders from Verizon. If existing TELRIC rates include the costs associated with most routine network modifications, the CLEC is already obligated to pay for those modifications though its UNE rates. Second, to the extent the costs are not included and the Commission must set a new rate, the CLEC will be obligated to pay that rate as well. Third, if Verizon and the CLEC agree to a rate for a new modification or to a true-up after the Commission sets a rate, that agreement could be incorporated into a letter amendment to the interconnection agreement, thereby protecting both the CLEC and Verizon. To the extent that a Commission order is needed to resolve a dispute between Verizon and the CLEC, both parties will be bound by the terms of any such order. Finally, we reject Verizon's contention that the decision we made on June 11th and the one we issue today in any way "overrules" the requirements of the FCC and the TelAct that parties include all terms and conditions in their interconnection agreements. Instead, we find that our decisions support the swift implementation of the requirements of the TelAct and the FCC – a goal all parties should support.

Dated at Augusta, Maine, this 19th day of August, 2004.

BY ORDER OF THE COMMISSION

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Raymond J. Robichaud
Acting Administrative Director

COMMISSIONERS VOTING FOR: Welch
Diamond
Reishus

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.